No. 14543

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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Statement of the Case.

Appellant's statement of the case, as far as it goes, is a fair summary. Inasmuch as the case is here on a relatively short typewritten Reporter's Transcript, we will not add to the record by giving a substitute Statement of the Case.

Attention is invited that on the former trial, appellant Brown took the stand, he elected not to testify in this the re-trial.

At the former trial no effort was made by the defense to impeach the credibility of the now deceased witness Frank J. Stafford, although at the former trial one of the impeaching witnesses, *i. e.,* Ben Ayers, admitted he had been subpoenaed at the first trial [R. p. 220][1] but did not

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[1]"R" refers to Reporter's Transcript of Proceedings.

testify [R. pp. 222 and 224]. Witness Ayers had no knowledge of the facts of this case, his testimony, if desired, was only as to the credibility of the witness Stafford.

Appellant Brown made the last sale of narcotics on March 13, 1953. The Narcotics Agents did not arrest Brown until April 17, 1953 [R. p. 111]. An explanation of the delay in the arrest was to permit a continuance of the investigation because information was had that another person, a Mr. Hollins was also involved in the sale of narcotics [R. p. 112].

Statutes Involved.

Title 21 United States Code Section 174 provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violations of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and proba-

tion shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b) (1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of this Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the norcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. * * *"

ARGUMENT.

I.

No Error Was Committed by the Court in Refusing to Dismiss the Indictment.

The substantive counts of which the appellant was convicted, *i. e.,* counts 2 through 5, inclusive, substantially followed the language of the statute (21 U. S. C. Sec. 174) and are substantially in the language of like indictments that have been sustained under this and similar charges.

Count Two is the *sale* of March 4, 1953. [See Clk. Tr. pp. 4 through 5 for the counts involved in this appeal.

Count Four is the "receive, conceal and facilitate the transportation" of the same heroin as set forth in count two.

Count Three is the sale of March 13, 1953, whereas *Count Five* is the concealment, etc. of the same heroin described in Count Three.

There is no merit to appellant's tenuous argument to the effect that the indictment should have directly alleged that the narcotic drug was "imported contrary to law". The equivalent of such an allegation is fully set forth in each count of the indictment, it reads: ". . . which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174." [Clk. Tr. p. 4.][2]

We agree with appellant, as stated on page 8 of his Opening Brief that a "sale" is a "separate offense," and punishable separately to the offense of receiving and con-

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[2]"Clk. Tr." refers to the Clerk's Transcript of Record.

cealing the heroin. Obviously, one could hardly transport, or aid and assist in transporting a narcotic drug without first receiving it by actual or constructive possession, and such reasoning is equally true for the receipt or concealment of the forbidden drug. It, therefore, seems logical that a sale is a distinct offense, whereas the receiving, concealing and transportation are so logically interwoven that such acts constitute but one offense and are properly an offense distinct to themselves and apart from a sale. If such is not true, then surely some effort to ask for an election as to the charge of receiving, concealing or transportation should have been urged, none was.

An indictment that was held sufficient, and one that employed language strikingly similar to the instant indictment is to be noted in the case of:

> *Parmagini v. United States,* 42 F. 2d 721 (C. A. 9, 1930), cert. den. 283 U. S. 818.

In the *Parmagini* case it was also stated (p. 724):

> "Under this law concealment and sale are distinct offenses, and therefore each act is punishable, although both occur in connection with a single transaction" (citing authorities).

An additional authority of this Court of Appeals sustaining the sufficiency of such an indictment as here challenged is *Pon Wing Quong v. United States,* 111 F. 2d 751 (C. A. 9, 1940), for on page 755 of the *Pon Wing* case, the same objection as now urged was considered:

> "But there is a further objection that, 'the second count fails to allege directly any knowledge on the part of said defendants * * * that said opium had been imported into the United States contrary to

law', claiming that the phrase 'as said defendants then and there knew' is but a recital. There is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, but we hold that this does not obtain in our case. The applicable part of the count is as follows: 'That at the time and place mentioned in the first count, in said Division and District, said defendants fraudulently and knowingly did facilitate the transportation of said lot of smoking opium, in quantity particularly described as 250 five tael cans containing approximately 1,665 ounces of smoking opium; and the said smoking opium had been imported into the United States of America contrary to law, *as said defendants then and there knew.*' (Italics supplied.)"

For additional authorities sustaining the sufficiency of indictments brought under kindred statutes dealing with narcotics see:

Rosenberg v. United States, 13 F. 2d 369 (C. A. 9, 1926);

Foster v. United States, 11 F. 2d 100 (C. A. 9, 1926);

Wong Lung Sing v. United States, 3 F. 2d 780 (C. A. 9, 1925).

Since the adoption of the New Rules, that is, the Federal Rules of Criminal Procedure, namely, Rule 7(c), it may well be said that virtually all of the cases that have construed the sufficiency of an indictment have established a premise or rule that: *The modern practice of the Federal Courts is to consider the adequacy of indictments on the basis of practical as opposed to technical consideration.*

As an illustration we refer to a relatively recent case of this Circuit Court, *United States v. Bickford*, 168 F. 2d 26 (C. A. 9, 1948). In the *Bickford* case the District Court had held a perjury indictment to be insufficient in that it did not directly aver that the officer administering the oath had competent authority to administer same. In reversing the District Court's holding and in declaring the indictment to be sufficient this Circuit commented that the Criminal Rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. The court discussed the purpose of an indictment and in quoting from the often referred to case of *Hagner v. United States,* said:

> "As observed in *Hagner v. United States, supra,* at page 433 of 285 U. S., at page 420 of S. Ct., 'it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

Without belaboring the point that the courts have become more liberal since the adoption of the New Rules effective March 21, 1946, we do, in passing, refer to a few more authorities to such effect. In a case tried in this district, namely, *United States v. Ochoa,* 167 F. 2d 341 (C. A. 9, 1948), where the death penalty was enacted, the Court of Appeals held that the omission in a murder charge of the phrase "with malice aforethought," as was provided in the statutory definition of murder (18 U. S. C. 452), was not bad. The court pointed out that the indictment in the *Ochoa* case was modeled after Form No. 1 in the Appendix to the Federal Rules of Criminal Procedure. The Ninth Circuit has repeatedly reaffirmed a liberal interpretation in construing indictments. See, *McCoy v. United States,* 169 F. 2d 776 (C. A. 9), in which case

the court pointed out that every particular relating to the charge is not required to be set out in the indictment. To like effect:

> *Flynn v. United States,* 172 F. 2d 12 (C. A. 9, 1949).

A failure to allege that the alleged false statements were material, or to state to what person or agency or official of the United States, the false writing was submitted was not a basis for a motion to dismiss an indictment.

> *United States v. Varano, et al.,* 113 Fed. Supp. 867, D. C. Pa.).

An omission of a formal conclusion that the offenses charged were committed against the United States is not error.

> *United States v. Gicinto,* 114 Fed. Supp. 204 (W. D. Mo., 1953).

II.

The Evidence Was Amply Sufficient to Sustain the Conviction.

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." A verdict supported by sufficient evidence is binding on a reviewing court. (*United States v. Socony Vacuum Oil Co., Inc.,* 310 U. S. 150, 254 (C. A. 7); *Glasser v. United States,* 315 U. S. 60, 80 (C. A. 7) as follows:

> "It is not for us to weigh the evidence or to determine the cerdibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *United States v. Manton,*

107 F. 2d 834, 839, and cases cited. Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' *United States v. Manton, supra.*"

Abrams v. United States, 250 U. S. 616, 619;

Orvis v. Higgins, 180 F. 2d 537, 539 (C. A. 2);

Stillman v. United States, 177 F. 2d 607 (C. A. 9);

McQuinn v. United States, 191 F. 2d 477 (C. A. D. C.);

Carlson v. United States, 187 F. 2d 366 (C. A. 10), cert. den. 341 U. S. 940.

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this circuit is noted in *Stillman v. United States,* 177 F. 2d 607 at p. 616:

". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), certiorari denied, 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

The argument advanced by appellant overlooks the fact that possession of the narcotics need not be personal and actual but can be constructive. Furthermore, one who aids or assists in the commission of a crime is equally guilty and such principle of law was recognized by the trial court in the instructions given [R. pp. 269-270]. The Court gave the well recognized instruction: There are two kinds of possession "actual possession and constructive

possession" [R. p. 270] and that the possession may be "sole or joint."

The court likewise read from the statute pertaining to the aiding, abetting or procuring of the commission of a crime, namely, from Title 18 U. S. C., Sec. 2 [R. pp. 257, 258].

It is to be noted that Count Two charged the sale of forbidden heroin as of March 4, 1953. The evidence supports the conclusion that the appellant Brown received $600 for this particular heroin from the witness Stafford [R. p. 33] but that the delivery of the heroin was accomplished through "a man standing on the corner seated in another Cadillac". [R. p. 33]. It further is to the effect "that he (Brown) told me this man that was the party that wanted the heroin and for him to give it to me when I came back." [R. p. 33]. This same "man" is referred to in the record on pages 34, 35, and during the cross-examination on page 70. It is thus apparent that the appellant Brown was operating through a confederate who remained unidentified. Hence, not only did the sale, as involved in Count Two, implicate Brown but likewise the transportation as involved in Count Four of this same narcotics clearly implicated appellant Brown, despite the fact that Brown may not have actually had the exclusive physical possession of the narcotics involved.

The second sale was accomplished on March 13, 1953, and it involved the herein appellant Brown and another defendant Albert Hollins. As to this second sale, the same reasoning applies. It appears that the witness Stafford paid to the appellant Brown $600, whereupon Brown told "Al" (Hollins) and the witness Stafford to go sit in the car; within a few minutes thereafter two girls came along in an old grey Chevrolet and they handed a

package to Brown [R. p. 46]. Thereafter, appellant Brown walked to the car where "Al" (Hollins) was sitting and handed the package to "Al" and told "Al"—"to give me two of the parcels." After which Hollins delivered two of the parcels to the witness Stafford [R. p. 47]. It is thus seen in this second transaction that Brown accepted the money; that he initially received the package from the two girls and told "Al" Hollins to turn over two of the parcels to the witness Stafford. In other words, Brown had not only consummated the sale but he also had possession of the parcels that were ultimately delivered to the witness Stafford.

This Court, in the case of *Pon Wong Quong v. United States,* 111 F. 2d 751, p. 754 (C. A. 9, 1940), recognized that one may be guilty who aids and abets by recognized principles of law of constructive possession (pp. 756-757).

> "Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment."

And, again in the same case on page 758:

> "Possession of the opium as that expression is commonly understood is in neither case a requisite of guilt."

See also:

> *Borgfeldt v. United States,* 67 F. 2d 967 (C. C. A. 1933).

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be "personal and exclusive" was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see p. 969).

Another *narcotic* case to the same effect:

United States v. Cohen, 124 F. 2d 164 (C. C. A. 2d); cert. den. 315 U. S. 811 (*Bernstein v. United States*).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The Court stated, on page 165, as follows:

> "The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. United States v. Hodorowicz, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; Vilson v. United States, 9 Cir., 61 F. 2d 901."

An additional *narcotic* case is:

Mullaney v. United States, 82 F. 2d 638 (C. C. A. 9th, 1936).

In the *Mullaney* case the Court, on page 642, discusses a charge with relation to accomplices, and points out that by reason of 18 U. S. C. A. 550 (now 18 U. S. C., Sec. 2), the distinction between principals and accessories has been abolished. On pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the Court pointed out, particularly on page 642, that an instruction requiring that possession must be "personal and exclusive," was not correct.

III.

No Misconduct Was Committed by the Assistant United States Attorney.

Appellant contends that the Assistant United States Attorney was guilty of prejudicial misconduct. This contention pertains to an objection made to the offer of an impeaching witness who was offered to impeach the then deceased witness Frank Stafford. It should be observed that at no time during the trial did appellant specifically assign such alleged misconduct as error and no objections were made to preserve the record. It is submitted that the alleged misconduct is in fact not misconduct, but even though it were, it is not in the category of being plain error as is contemplated by Rule 52(b) of Federal Rules of Criminal Procedure.

It is submitted that the record clearly establishes the guilt of the appellant. This is not a case predicated upon speculative, uncertain or weak evidence. If any misconduct was perpetrated by the Assistant United States Attorney that fact should have been called to the Court's attention so that the error, if any, might be cured. One should not remain silent and raise the matter for the first time on appeal. The principle above announced of an obligation of counsel to timely object is noted in the following cases:

McQuaid v. United States, 198 F. 2d 987, 990, (C. A. D. C.), cert. den. 344 U. S. 929;

Alberty v. United States, 91 F. 2d 461, 464 (9th Cir., 1937).

The Assistant who tried the case on behalf of the Government was well aware of the salutary ruling announced in the excellent case of *Berger v. United States,* 295 U. S. 78 (1935). In the *Berger* case, the conduct of the repre-

sentative of the Government was to put it mild, grossly objectionable and was properly recognized by the Supreme Court as being such. However, on page 89 of the *Berger* case we find the following language:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

The *objection* imposed by the Assistant United States Attorney, to the offer of evidence seeking to impeach the credibility of the deceased witness Stafford upon the ground that no effort had been made to impeach his testimony during his life time, while not constituting a proper objection to the offer of such impeaching testimony, can still not be said to have been made in bad faith. Appellant's (Brown's) counsel made no objection to such observation. In fact the observation was supported by the previous record. However, such does not indicate that it was made in bad faith. We have carefully reread the other specific questions that have on pages 10 and 11 of Appellant's Opening Brief been assigned as misconduct. Suffice it to say that no objections were made to such questions.

At the trial, Brown was endeavoring to discredit, as unreliable, the testimony of the then deceased witness Stafford. As we have reread the cross-examination, it would appear that the prosecutor unwittingly permitted the impeaching witnesses to bolster the contention of the defense of the possible unsavory repute of the witness Stafford, as such witnesses were quick to refer to

specific facts that they felt supported their opinion that the reputation of the deceased witness Stafford for truthfulness was bad.

The jury, apparently, concluded that the testimony of the witness Stafford was not only believable, but was fully corroborated by the testimony of the various Government Agents.

It is rather unsual to note that the impeaching witness Ben Ayers conceded that he had been subpoenaed at the first trial, but still did not testify [R. p. 220], and that he was available for the first trial and was asked to be a witness by appellant Brown's attorney but still did not testify [R. pp. 222-224].

It is interesting to note that this court, as recently as of September, 1954, affirmed a narcotic conviction where this same witness Stafford also had made the heroin purchases and where, in such case, the defendant urged that Stafford was a disreputable character that should not be believed. We refer to:

> *Henry v. United States,* 215 F. 2d 639 (C. A. 9, 1954).

It should be recalled that the impeaching witnesses testified that the reputation of the deceased witness Stafford for truth and honesty was bad. Obviously, in the discretion of the trial court, reasonable latitude should be permitted upon cross-examination to show the witness' knowledge or lack of same as to the reputation of the person involved, as to his bias, or prejudice, as to whether he or she is expressing his or her personal opinion or that expressed by the community, the surroundings of the witness, and interest in the case, or that his testimony is inherently improbable. Even the going into collateral mat-

ters is not improper where it bears a reasonably clear relationship to the subject matter that the witness has testified to. It is true no witness should be taunted, degraded, or unduly embarrassed, but such is not the case here. The right of cross-examination is a matter of right, to place a witness in his proper setting. This the Supreme Court said in *Alford v. United States,* 282 U. S. 687.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensures from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . ."

To like effect see:

> *United States v. Edmonds,* 63 Fed. Supp. 968 (D. C. Dist. Col., 1946), at page 973.

An illustration of where alleged improper cross-examination was held to not be error is the case of *United States v. Weiss,* 103 F. 2d 348 (2d Cir., 1939), at pp. 354, 355.

The Supreme Court in the case of *Michelson v. United States,* 335 U. S. 469, in an Encyclopedic Opinion written by the late Justice Jackson points out the latitude that is permitted in cross-examining a character witness who endeavored to bolster the character or reputation of a defendant. If this be good law, which it appears to be, certainly similar latitude should be allowed in cross-examining an impeaching witness.

An excellent discussion of the extent that should be allowed in cross-examination is noted in the case of *United States v. Lawinski,* 195 F. 2d 1 (C. A. 7, 1952), at page 7:

> "The rule in federal courts governing the proper scope of cross-examination has never been more simply stated than by Mr. Justice Story in Philadelphia & T. Ry. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535; in these words: 'A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination.' . . .
>
> "Legal history has proved that the rule is conducive 'to the systematic and orderly trial of causes.' 5 Jones on Evidence 4579. However, a well known exception to the rule is recognized, and that is that collateral matters may be gone into on cross-examination to a limited extent for the purpose of testing the witness' credibility. Thus, inquiries may properly be directed to the witness' interest, his motives, his prejudices or hostilities, his means for obtaining knowledge of the fact, his power of memory, his way of life, his associations and to any pertinent circumstances affecting his credibility. Within this exception also lie certain methods of impeachment, such as his statements contrary to his direct testimony, and convictions for crime.
>
> "These relaxations of the general rule governing the proper scope of cross-examination, however, obviously cannot be defined with certainty to fit all occasions; their extent and limitations will depend upon the particular facts and circumstances of the case on trial. Generally, therefore, it is recognized that determination of where those limitations lie is within the sound discretion of the trial court. It is for the presiding judge to exercise a wise discretion in

> determining whether, considering the examination in chief, it is fit and proper that the questions presented be permitted or excluded. Storm v. U. S., 94 U. S. 76, 24 L. Ed. 42 . . ."

As we have heretofore stated, to preserve a matter on appeal, even as to improper cross-examination, an objection should have been made so as to accord the Court a chance to correct the error.

> *Salerno v. United States,* 61 F. 2d 419, 424 (C. A. 8th, 1932);
>
> *Panzich v. United States,* 65 F. 2d 550, 552 (C. A. 9th, 1933).

We refer to an often quoted case of the Supreme Court covering the subject matter of failing to object to alleged impropriety.

> *United States v. Socony Vacuum Oil Company,* 310 U. S. 150.

Wherein the Supreme Court reversed the action of the Appellate Court and sustained the conviction of the District Court. There is a rather full treatment of this proposition of law commencing at page 237 to and including page 243, as we quote:

Pages 238-239:

> "In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial. See Crumpton v. United States, 138 U. S. 361, 364."

Page 243:

> "As stated in Dunlop v. United States, 165 U. S. 486, 498, 'If every remark made by counsel outside of the testimony were ground for a reversal comparatively few verdicts would stand.'"

It is well settled in this Circuit that exception to argument of counsel without more, does not raise a question of law. We cite the case of:

> *McDonough, et al. v. United States,* 299 Fed. 30 (9th Cir., pp. 38-39).

The Courts have generally held that where no objection was made to remarks made by the prosecutor in his closing arguments the question of the impropriety of such remarks has not been preserved for review.

> *Allen v. United States,* 192 F. 2d 570 (C. A. 5, 1951).

To like effect:

> *Heald v. United States,* 175 F. 2d 878, 882 (C. A. 10th, 1949);
>
> *Vendetti v. United States,* 45 F. 2d 543 (C. A. 9th, 1930);
>
> *Pacman v. United States,* 144 F. 2d 562 (C. A. 9th, 1944).

IV.

There Was No Error Committed in Any of the Instructions.

On page 12 of Appellant's Opening Brief a portion of the Court's instruction is set forth and urged as being erroneous. As stated, only a portion of the instruction has been set forth. To get a proper conception of this phase of the charge one should read the entire instruction upon this subject, which is reflected on page 258 of the Reporter's Typewritten Transcript where the Court gave the instruction pertaining to causing, aiding, and abetting, etc., as is provided for by 18 U. S. C., Section 2, and the remainder of the instruction given on this subject.

It should be noted that counsel made no objection to the instructions given [R. p. 277]. In fact, prior to giving the instructions, when the Court specifically asked if there were any suggestions or objections to the proposed instructions, counsel replied:

> "Mr. Gordon: No, Your Honor, there is none." [R. p. 250.]

And, later stated that he was satisfied with the instructions the Court proposed to give [R. p. 250].

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure error cannot be assigned unless an objection has been made. Late Opinions enunciating the rule that normally speaking an objection should be urged at the trial, and the grounds stated as to the instructions proposed, or to the fact that such instructions omit essential

elements and in the absence thereof no preservation of error is had for the reviewing court, are the following:

Kobey v. United States, 208 F. 2d 583, p. 588 (C. A. 9th, 1953);

Enriquez v. United States, 188 F. 2d 313, p. 316 (C. A. 9th, 1951);

Cosenza v. United States, 195 F. 2d 177 (C. A. 9th, 1952).

V.

The Sentence, While Severe, Was Not Arbitrary and Was Within the Limits Provided For By Law.

It is true that the Court imposed the maximum sentence on each count. The record reveals that this is an admitted second conviction of the defendant for similar such narcotic offense [R. pp. 292-293]. The statute permits the maximum of ten years on each count for a second offender. Congress and other legislative bodies have of late seen fit to increase the punishment of those dealing in illicit drugs.

A sentence of a defendant in a narcotic case, to a total of *52* years, while severe is neither cruel nor unusual in a constitutional sense, but is in kind that which is usually visited by law, and since it does not exceed that permitted by statute the Appellate Court is without power to relieve from such sentence.

Ginsberg v. United States, 96 F. 2d 433, p. 437 (C. A. 5th, 1938).

A sentence within the limits of an applicable statute will not be reviewed by a Court of Appeals.

Smith v. United States, 214 F. 2d 305, 311 (C. A. 6th, 1954).

A sentence of a second offender on a federal narcotic charge, within the limits allowed by statute may not be modified by the Court of Appeals.

United States v. Kapsalis, 214 F. 2d 677, 683-684 (C. A. 7th, 1954).

That such a sentence, or separate sales of narcotics constituted distinct offenses is well settled.

King v. United States, 214 F. 2d 713 (C. A. 10th, 1954).

That the various counts involved here contain a different element to each other and necessitated proof of a fact not essential to the other is fully settled; such being so a consecutive sentence could lawfully be imposed on each separate count.

United States v. Hardgrove, 214 F. 2d 673 (C. A. 7th, 1954).

A District Court imposing a sentence authorized by law commits no error, and the Appellate Court should not concern itself with such sentence.

Holmes v. United States, 134 F. 2d 125, p. 135 (C. A. 8th, 1943), cert. den. 319 U. S. 776.

To like effect:

Kawakita v. United States, 190 F. 2d 506 (C. A. 9th, 1951), affirmed 343 U. S. 717, p. 745 (a sentence of death for treason);

United States v. Sorcey, 151 F. 2d 899, p. 902 (C. A. 7th, 1945);

United States v. Rosenberg, 195 F. 2d 583, p. 603 (C. A. 2d), cert. den. 344 U. S. 838;

Cosenza v. United States, 195 F. 2d 177, 178 (C. A. 9th, 1952).

A "harsh" sentence based upon the contention of "war hysteria" does not justify setting aside the discretion imposed in the trial court.

Shaw v. United States, 151 F. 2d 967, p. 971 (C. A. 6th, 1945).

Conclusion.

It is respectfully submitted that the Judgment should be affirmed and in nowise modified.

Respectfully submitted,

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